82-2058

Office-Supreme Court, U.S.
FILED
JUN 13 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, Trading and
Doing Business as NELSON HOUSE,
Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

BAYARD M. GRAF
HAROLD E. KOHN
KOHN, SAVETT, MARION & GRAF, P.C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900
Attorneys for Petitioner

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED FOR REVIEW

1. Does a Pennsylvania Act of Assembly, requiring a Pennsylvania private institution to pay for the public education of a mentally retarded child residing therein, whose parents are New Jersey residents, violate the Equal Protection Clause, when all Pennsylvania mentally retarded children are provided a free public education?

2. Is it not a violation of Section 504 of the Federal Rehabilitation Act of 1973 for respondent, a recipient of federal funds, to charge tuition to educate a mentally retarded child residing in respondent's school district in Pennsylvania, having parents residing in New Jersey, when all Pennsylvania mentally retarded children are provided a free public education?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iii
Reference to Opinions Below	1
Statement of Grounds for Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions Involved	1
Statement of the Case	4
Argument	8
Conclusion	12
Appendix	
Pennsylvania Supreme Court Opinion	A-1
Pennsylvania Commonwealth Court Opinion	A-7
Huntingdon County, Pennsylvania, Common Pleas Court Opinion	A-10
Pennsylvania Supreme Court Judgment	A-14

TABLE OF AUTHORITIES

Cases:	Page
Barrows v. Jackson, 346 U.S. 249 (1953)	11
Counts v. U.S. Postal Service, 631 F.2d 46 (5th Cir., 1980)	11
Martinez v. Bynum, ____ U.S. ____, 51 U.S.L.W. 4524 (1983)	8, 9
Nodleman v. Aero Mexico, 528 F. Supp. 475 (D.C.C.D. Calif., 1981)	11
Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971)	5
343 F. Supp. 279 (E.D. Pa. 1972)	4, 5
Plyler v. Doe, 457 U.S. ____, 50 U.S.L.W. 4650 (1982)	8, 9
Shirey v. Devine, 670 F. 2d 1188 (D.C. Cir., 1982)	11
Constitutional Provisions:	
Constitution of the United States:	
Article III	11
Fourteenth Amendment	1, 8, 9, 10, 12
Statutes:	
28 U.S.C. Section 1257(3)	1
29 U.S.C. Section 794	2, 6, 10, 11
29 U.S.C. Section 794a	11
24 P.S. 13-1308	1
Other Authorities:	
42 C.F.R. 84.33(a) and (b)	2
42 C.F.R. 84.33, Appendix A, Subpart D, Note 23	2, 10

REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Common Pleas of Huntingdon County, Pennsylvania, is in the Appendix and is not reported.

The Opinion of the Pennsylvania Commonwealth Court is reported at 57 Commonwealth Ct. 514 (1981), 426 A.2d 1234. A copy of the Opinion is set forth in the Appendix.

The Opinion of the Pennsylvania Supreme Court is not yet officially reported. A copy of the Opinion is set forth in the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

The Judgment of the Supreme Court of Pennsylvania, Eastern District, was dated and entered on March 16, 1983.

The statutory basis for this Court's jurisdiction is 28 U.S.C. Section 1257(3), in that this is a Petition for Writ of Certiorari seeking review of the Judgment of the Supreme Court of Pennsylvania, Eastern District, affirming the Order of the Commonwealth Court of Pennsylvania filed March 16, 1981, affirming the Judgment of the Pennsylvania Huntingdon County Court of Common Pleas filed December 20, 1979.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fourteenth Amendment

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1308 of the Pennsylvania Public School Code of 1949, Act of March 10,1949, P.L. 30, Art. XII, Sect. 1308, 24 P.S. 13-1308

If any inmates have been received from outside of Pennsylvania, or if the institution cannot certify as to their residence, their tuition shall be paid by the institution having the care or custody of said children. . . .

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; Pub. L. 93-112, Title V, Sect. 504, Sept. 26, 1973, 87 Stat. 394

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Department of Health, Education and Welfare Regulation No. 84.33, 42 C.F.R. 84.33(a) and (b)

(a) GENERAL. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) APPROPRIATE EDUCATION. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§84.34, 84.35, and 84.36.

Appendix A — Analysis of Final Regulation, Subpart D — Preschool, Elementary and Secondary Education to Regulation No. 84.33, Note 23

23. FREE APPROPRIATE PUBLIC EDUCATION. Former §§84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new

§84.33. Under §84.34(a), a *recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence*. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility. (Emphasis supplied)

STATEMENT OF THE CASE

This is an action in Assumpsit commenced June 20, 1975, by Respondent, Intermediate Unit, against Petitioner residential care provider in Huntingdon County, Pennsylvania, Court of Common Pleas, to recover the cost of educating Lawrence F. Terwilliger, for the 1973–74 school year.

On July 9, 1975, the case was removed to the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 75-1987, on the ground that the Court had theretofor assumed and retained jurisdiction of all matters covered by the Huntingdon County action in *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.*, 343 F. Supp. 279 (1972) then assigned to the Honorable Edward R. Becker. There the Commonwealth of Pennsylvania had consented, on behalf of all of the Intermediate Units in the Commonwealth,

> "43. Every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972." 343 F.Supp. 279, 314 (1972)

While the action was pending in the Federal District Court an Answer was filed conforming to the Federal Rules. The Fifth Defense alleged that like any citizen of the United States moving from one state to another, the said Larry Terwilliger is entitled to the equal protection of the laws of the United States of America. The Sixth Defense raised the issue of lack of due process and the Seventh Defense averred that it would be a confiscation of property without legal authority or basis in law to require petitioner to pay for the education of Larry Terwilliger. The case was remanded to the Huntingdon County Common Pleas Court by Order of the Honorable Edward R. Becker, dated December 23, 1976.

Upon return to Huntingdon County, the matter was referred to arbitrators, who awarded, on January 19, 1978, the respondent $1,687.09, plus interest and costs.

An appeal of the award was taken to the Huntingdon County Common Pleas Court and hearing thereon held June 20, 1978 before the Honorable Morris M. Terrizzi.

At the trial, the parties agreed upon the following statement of facts:

On June 26, 1972, Lawrence Fran Terwilliger, (hereinafter called "Larry"), was transferred from the Lochland School, Inc., in Geneva, New York, to Nelson House, located at Spruce Creek in Huntingdon County, Pennsylvania. This was a private placement arranged by Larry's parents. Larry was born June 11, 1959, of parents residing in New Jersey, divorced at the time of said transfer, the mother, residing at 366 Beveridge Road, Ridgewood, New Jersey, and known as Mrs. William A. (Carol J.) McManus.

Petitioner, Nelson House, is licensed by the Pennsylvania Department of Public Welfare as an institution providing residential care for mentally retarded children and is operated by Edgar D. Nelson, trading as Nelson House.

On October 31, 1973, Respondent, Tuscarora Intermediate Unit No. 11, declined to enroll Larry in its program for trainable mentally retarded students on the ground that Larry's parents were residents of New Jersey. Upon application to the Pennsylvania Department of Education by Petitioner, The Right to Education Office in the Division of Special Education directed the Respondent to enroll Larry, which Respondent did. Under date of August 9, 1974, Tuscarora Intermediate Unit No. 11 billed Nelson House for tuition for Larry for the 1973–74 school year, itemized as 114 days at $10.01 per day, or $1,141.14, subsequently changed to read $1,687.09.

Upon the filing of the Consent Decree in the case of *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.*, 334 F.Supp. 1257 (E.D. Pa. 1971), 343 F.Supp. 279 (E.D. Pa. 1972), in which the court assumed jurisdiction over, among others, all of the Intermediate Units in the Commonwealth of Pennsylvania, all retarded and handicapped children who were residents of the Commonwealth of Pennsylvania were entitled to a free education. This decree does not address the question of whether or not a child

physically present in Pennsylvania, living in a facility licensed by the Pennsylvania Department of Public Welfare, whose parents reside outside of Pennsylvania, is entitled to a free education from Pennsylvania.

At the time of placement of Larry at the home of Petitioner, there was no written agreement between Petitioner and Larry's mother or father. Petitioner orally agreed to provide Larry with residential support at the cost of $600.00 per month. This arrangement continued through the 1975–76 school year, at which time Larry ceased to live in Pennsylvania. Petitioner received no funding from the Commonwealth of Pennsylvania or the State of New Jersey for the care, maintenance, support or education of Larry.

Larry did not live at home with his family because the family—neither his natural mother, nor his natural father—could cope with his problems and demands. Larry did not live in the State of New Jersey because a suitable residential facility and program could not be found. Larry has limitations of immature behavior and lack of self-control.

Respondent has not sought to recover the cost of education of Larry from Larry's parents.

Respondent was receiving federal funding at the time Larry was enrolled with Respondent and continued to do so throughout the entire period Larry lived in Pennsylvania.

Before the Arbitrators, the Common Pleas Court, and the two appellate courts Petitioner raised the issues of unjust discrimination under Section 504 of the Rehabilitation Act of 1973, as well as violation of the Equal Protection Clause. In each case the court held such arguments were without merit.

On December 20, 1979, the Common Pleas Court (Honorable Morris M. Terrizzi) filed its Opinion and Verdict in favor of the respondent for $1,687.09, with interest from June 20, 1975. After judgment was entered thereon, an appeal to the Commonwealth Court was perfected. On March 16, 1981, the Commonwealth Court (Craig, J.) filed an Opinion and Order affirming the judgment of the court below, 57 Commonwealth Ct. 514 (1981), 426 A.2d 1234.

On June 30, 1981, appellant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was granted, argument had thereon on December 8, 1982, and the Opinion and Judgment filed March 16, 1983, affirming the Order of the Commonwealth Court.

ARGUMENT

This Court has had an opportunity recently to review matters similar to the issues raised in this Petition, namely, *Plyler v. Doe*, 457 U.S. ____, 72 L.Ed.2d 786, 102 S.Ct.____(1982) and *Martinez v. Bynum*, No. 81-857, U.S. ____, ____ L.Ed.2d ____,102 S.Ct. ____ (1983), 51 Law Week 4524.

In *Plyler v. Doe, supra*, this Court held that a Texas statute witholding funds from local school districts for education of children not legally admitted into the United States and authorizing districts to deny enrollment to such children violated the equal protection clause of the Fourteenth Amendment. There this Court held that the plaintiff children of the illegal migrants from Mexico are special members of the underclass, that the children were not comparably situated to their "parents who have the ability to conform their conduct to societal norms," and that the children "can effect neither their parents conduct nor their own status." This Court further said that "even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."

This Court again stated that public education is not a fundamental right guaranteed by the Constitution but did again reiterate that where the state has undertaken to provide a free education, it is a right which must be made available to all on equal terms: 72 L.Ed.2d 803.

The admitted and agreed facts in this case are that the Commonwealth of Pennsylvania agreed to provide all retarded and handicapped children who are residents of the Commonwealth of Pennsylvania a free education (Statement of the Case, p. 4, 5). Further it was agreed and admitted that "Larry did not live in the State of New Jersey because a suitable residential facility and program could not be found." (Statement of the Case, p. 6). The Pennsylvania Supreme Court affirmed this fact, which was related to be undisputed, that when the lad was transferred from Geneva, New York to Huntingdon County, Pennsylvania, "the child did not move to New Jersey because a residential facility could not be found there that was suitable to his needs." (A-2).

Thus there is here a situation of compelling necessity. Just as in *Plyler*, where this Court found the Texas statute violative of the Fourteenth Amendment because it imposed a lifetime hardship on a discrete class of children not accountable for their disabling status, there is here a discrete class of children who cannot reside with their parents in the State of New Jersey because there is no suitable residential facility and program.

About a month ago on May 2, 1983, this Court decided *Martinez v. Bynum, supra*, upholding the same Texas statute providing a free public education to any child properly residing in Texas living apart from his parent, guardian or person having lawful control of him on the condition that such child's presence is for other than "the primary purpose of attending the public free schools." There this Court rejected a challenge to the statute on its face. It held a *bona fide* residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for the State's residents are enjoyed only by residents. It further held that a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional basic residence criteria, *i.e.*, to live in the district with a *bona fide* intention of remaining there and that so long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test.

Mr. Justice Brennan, concurring in *Martinez*, pointed out that *Martinez* only involved a facial challenge to the constitutionality of the Texas statute but that the Court does not pass on its validity as applied to children in a range of specific factual contexts.

In the context of this Petition it is clear that the State of New Jersey, where the parents of the child resided, was unable to provide Lawrence F. Terwilliger with an education, free or otherwise, because as a fact "a residential facility could not be found there (in New Jersey) that was suitable to his needs."

Under the compulsory education laws it was necessary for Petitioner to require the Pennsylvania Department of Educa-

tion to compel respondent to provide this education. (Statement of the Case, p. 5).

Pennsylvania, fortunately, had such a facility, namely, that of Petitioner. As aforesaid, all Pennsylvania children, similarly situated, are provided with a free education. It is a violation of the Equal Protection Clause not to provide this child, required under the circumstances to reside in Pennsylvania, with a free public education.

In addition to the foregoing substantial reason for granting this Petition for Certiorari, there is an equally compelling reason, namely, the charging of the tuition to educate the child violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. This Section mandates that no handicapped individual shall be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program receiving Federal financial assistance. It was here admitted that respondent received Federal financial assistance. (Statement of the Case, p. 6).

In Appendex A to Final Regulation 84.33 of HEW, Note 23, appearing as the last item in the Constitutional, Statutory and Regulatory Provisions Involved, p. 3, it is said:

> . . . a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence.
> . . .

Having received Federal financial assistance, respondent is *obliged to provide a free appropriate public education to the* child "in" the jurisdiction.

In its provincial attempt to justify its avoidance of providing a free education the Pennsylvania Supreme Court said in its Opinion (A-6): "And Nelson House has made no claim that they are bringing this suit on the child's behalf. . . ." A moment's reflection would have indicated that Nelson House was not bringing the suit but was sued.

The Pennsylvania Supreme Court dismissed Petitioner's Section 504 of the Rehabilitation Act argument on the ground

that Petitioner was clearly never intended to have standing to seek refuge under this federal statute. But Congress added Section 505 by Pub. L. 95-602, Title 1, Section 120, Nov. 6, 1978, 92 Stat. 2982, 29 U.S.C. 794a, providing that remedies, procedures and rights shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 794 (Section 504 of the Rehabilitation Act).

Surely Petitioner is a person aggrieved.

The use of the phrase "any person aggrieved" in Section 505 (a) (2) evinces a congressional intention to define standing to bring or defend a private action under Section 504 as broadly as is permitted by Article III of the Constitution: *Nodleman v. Aero Mexico*, 528 F. Supp. 475 (1981).

The Supreme Court has recognized that a person may sue to enforce the rights of others under Civil Rights statutes that confer standing to the full extent permitted by Article III where: (1) "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court", *Barrows v. Jackson*, 346 U.S. 249, 257,73 S. Ct. 1031, 1035, 97 L. Ed. 1586 (1953), *Nodleman v. Aero Mexico*, Supra.

The amendment adding 29 U.S.C. 794a making remedies, procedures and rights available to any person aggrieved is applicable to actions then pending: *Shirey v. Devine*, 670 F. 2d 1188 (1982); *Counts v. U.S. Postal Service*, 631 F. 2d 46 (1980).

Clearly, then, Petitioner, as an aggrieved party, may affirmatively use Section 504 of the Rehabilitation Act of 1973 to thwart this onerous suit.

CONCLUSION

This case presents a specific factual context involving a statute manifestly violative of the Equal Protection Clause, when applied to Lawrence F. Terwilliger, who could not find a place to reside in New Jersey, but in Pennsylvania, where Petitioner has sought to help him. It is rank discrimination to provide a free education to all of Pennsylvania's mentally retarded children regardless of where their parents reside, but to deny a free education to this unfortunate child born of New Jersey parents.

WHEREFORE, Petitioner respectfully urges this Court to grant his Petition for Certiorari.

Respectfully submitted,

Bayard M. Graf
Harold E. Kohn
KOHN, SAVETT, MARION & GRAF, P.C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900
Attorneys for Petitioner

[J-355]

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant* v. TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	No. 81-3-426 Appeal from the Order of the Commonwealth Court at No. 51 C.D., dated March 16, 1981, affirming the Order of the Common Pleas Court of Huntingdon County, at No. 60 September Term, 1975 ARGUED: December 8, 1982

OPINION

MR. JUSTICE McDERMOTT FILED: March 16, 1983

This is an appeal from the order of the Commonwealth Court[1], which affirmed the decision of the Court of Common Pleas of Huntingdon County[2], granting appellee a judgment of $1,687.09 plus interests and costs as against appellant for the educational costs for school year 1973-1974 incurred by a mentally-retarded minor who temporarily resided at appellant's private care facility. The issue is whether the Commonwealth of Pennsylvania by Act of Assembly[3] may require a private Pennsylvania institution to pay the cost of education in public school of a mentally retarded child residing in such Pennsylvania insti-

---

1. *Nelson House v. Tuscarora Intermediate Unit No. 11*, 59 Pa. Cmwlth. 514, 426 A.2d 1234 (1981).

2. Initially, this case was removed to the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 75-1987, but was remanded to the Huntingdon County Common Pleas Court by Order of Edward R. Becker, J., dated December 23, 1976.

3. Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. 13-1301 *et seq.*

tution, where the parents of the child are residents of the State of New Jersey.[4]

The facts of this case are undisputed and as follows: the handicapped child was born on June 11, 1959 of parents who have at all times relevant resided in New Jersey. On June 26, 1972, this lad was transferred by his parents from the Lochland School in Geneva, New York to Nelson House, located in Huntingdon County, Pennsylvania. At this time, the child did not move to New Jersey because a residential facility could not be found there that was suitable to his needs. The trial court determined that this youth was a trainable mentally retarded child suffering from limitations of immature behavior and lack of self-control.

Appellant, Nelson House, is a private institution, licensed by the Pennsylvania Department of Public Welfare, providing residential care for mentally retarded children. Appellant orally agreed with the child's parents to provide the boy with residential support at a cost of $600.00 per month from June of 1972 through the 1975-1976 school year. Appellant, as a private institution, has received no funding from the Commonwealth of Pennsylvania or the State of New Jersey for this child's maintenance or education.

Appellee, Tuscarora Intermediate Unit No. 11, pursuant to the Public School Code[5], enrolled this child in its program for trainable mentally retarded students for the 1973-1974 school year, and billed appellant Nelson House $1,687.09 for the tuition for this period. Appellee did not seek to recover the cost of the child's education from his parents. Appellee received federal funding throughout the 1973-1974 school year when this child was enrolled at Tuscarora Unit No. 11.

In July 1975, appellee brought an action in assumpsit against Nelson House, seeking to recover the cost of the child's education. Nelson House now seeks reversal of that judgment which required appellant to pay such costs.

---

4. Jurisdiction is vested in this Court pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, 2, 42, Pa.C.S.A. 724.

5. 24 P.S. §13-1306. Non-resident inmates of children's institutions.

A comprehensive review of the relevant provisions of the Public School Code indicates that appellant was obligated under the Public School Code to pay for the child's education while such child resided at appellant's private institution.

Initially, this child is not entitled to free education by virtue of being a resident of the school district serviced by Tuscarora Unit No. 11. Section 1302 of the Code, 24 P.S. §13-1302 provides in relevant part that, "A child shall be considered a resident of the school district in which his parents or the guardian of his person resides." The youth's parents resided in New Jersey and the Nelson House was not a "guardian" but simply a temporary custodian while the child resided at appellant's residential care facility.

Rather, the Public School Code specifically targets the private institution as bearing the burden of educational costs for out-of-state children that temporarily reside in the institution. Section 1308, 24 P.S. §13-1308, which details the tuition liability for inmates of children's homes, provides in pertinent part: "*If any inmates have been received from outside of Pennsylvania . . . their tuition shall be paid by the institution having the care or custody of said children.*" Moreover, Attorney General Opinion No. 69, dated October 11, 1973 interprets 13 P.S. §13-1308 as follows:

> "The institution is responsible for the public education tuition of out-of-state children. Therefore, *the institution should make arrangements with the parents for the child's educational expense before accepting the child.*
>
> If the out-of-state parents refuse to pay the institution, the institution must bear the expense." Pa. Bulletin, Vol. 3, No. 46, October 27, 1973 (emphasis added)

We find this interpretation of legislative intent to be both accurate and reasonable. Therefore, it is clear that the Nelson House, having accepted this boy into its program at a fee of $600. per month and having been on statutory notice of its obligation for these educational costs, is responsible for the lad's tuition under 24 P.S. §13-1308 of the Pennsylvania Public School Code.

Appellant argues, however, that 24 P.S. §13-1308 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." In support of his equal protection argument, appellant relies upon *Plyler v. Doe*, 50 U.S.L.W. 4650 (1982). In *Plyler*, the Supreme Court struck down a Texas statute as violative of equal protection which called for a withholding of funds from local school districts for education of illegal alien children and which authorized the school districts to deny enrollment to such children. Appellant avers that there is no difference between the illegal alien children that are residing in Texas and the child in the instant case that finds himself a legal resident of New Jersey yet residing in a private institution within the jurisdiction of Pennsylvania. As appellant's argument follows, since the Supreme Court in *Plyler* effectively mandated free public education for illegal aliens in Texas, Pennsylvania must provide the child in this case with a free public education. Therefore, it was improper to charge tuition of the appellant, despite the fact that 24 P.S. §13-1308 holds such institution liable. However, the rationale of the *Plyler* decision does not at all lend itself to the case at bar.

In *Plyler*, the issue was whether Texas could deny educational benefits to a class of persons who found themselves within the boundaries of Texas *illegally*. The Court in *Plyler*, after noting that the minor children of illegal aliens could not affect the conduct of their parents in illegally entering this country, held that the Texas statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives." 50 U.S.L.W. at 4656. Clearly the *Plyler* Court's concerns was with a state's treatment of the minor children of illegal aliens and their holding cannot be extended to require Pennsylvania to provide free public education to the minor children of parents from other states, who decide to have their children raised in a private institution in Pennsylvania.

Quite to the contrary, we find that the statutory scheme of free education under the Pennsylvania Public School Code does

not invidiously discriminate against out-of-state residents in violation of the equal protection clause. Free public education within any school district is available only to residents (as defined in 24 P.S. 13-1302) of that local school district. 24 P.S. 13-1301. And, the board of school directors of any school district may charge tuition to all out-of-district pupils that care to attend public school in their district, whether those pupils are residents of other Pennsylvania school districts or of other states. See 24 P.S. 13-1301, 13-1306. In this regard, Pennsylvania residents are clearly not accorded any special treatment over out-of-state residents under the public school code. Therefore, we find appellant's claim of an equal protection violation to be without merit.

Appellant also asserts that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, was violated by charging Nelson House for the child's education. That section provides in relevant part,

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."

The Department of Health, Education and Welfare (now HHS) promulgated interpretive regulations[6] whose purpose was to effectuate section 504 of the Rehabilitative Act of 1973. Appellant relies upon HEW regulation No. 84.33(a) which provides, "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 45 C.F.R. 84.33(a). Appellant's argument is that Tuscarora

---

6 It should be noted that these regulations were not in effect at the time of this controversy in 1973–1974 and, thus, they are not binding. However, a review of these subsequently enacted regulations serves as a meaningful guideline in ascertaining the intended rights and liabilities under this statute.

Intermediate Unit No. 11, as a recipient of federal funding, was obligated to provide this child, as a qualified handicapped individual in its jurisdiction, with a free public education. Therefore, it was improper to charge appellant for this child's tuition.

However, after reviewing cases construing §504 of the Rehabilitation Act of 1973 and reviewing the Act's interpretive regulations, we find that appellant Nelson House does not have standing to assert any rights under this federal statute. The standard for standing under §504 of the Act was set out in *Kampmeier v. Nyquist*, 553 F.2d 296, (2d Cir. 1977), where the second circuit held that students with vision in only one eye, who were refused permission by public school officials to participate in contact sports had standing, along with their parents, to bring suit against school officials under §504 of the Rehabilitation Act of 1973 *because they were the people in the best position to enforce §504, which is designed specifically for their protection*. 553 F.2d at 299 (Emphasis added). As it relates to free public education, §504 of the Rehabilitation Act of 1973 was designed for the protection of the handicapped person or his or her parents or guardian. HEW regulation 84.33 (c)(1) explicitly states, ". . .the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian. . ." And Nelson House has made no claim that they are bringing this suit on the child's behalf or that the child's parents in New Jersey will be refunded any funds in the event appellant were to succeed in this case. Moreover, HEW regulation 84.33 (c)(1) notes, "Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person." 45 CFR 84.33 (c)(1). Nelson House with such a valid obligation under 24 P.S. §13-1308 was clearly never intended to have standing to seek refuge under this federal statute.

For the reasons set forth above, the order of the Commonwealth Court is affirmed.

Former Mr. Chief Justice O'Brien did not participate in the decision of this matter.

EDGAR D. NELSON, TRADING AND DOING BUSINESS AS NELSON HOUSE, *Appellant* : IN THE COMMONWEALTH COURT OF PENNSYLVANIA

v.

TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee* : NO. 51 C.D. 1980

BEFORE: HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE DAVID W. CRAIG, Judge

ARGUED: February 5, 1981

OPINION BY JUDGE CRAIG FILED: March 16, 1981

Appellant Nelson House appeals from a verdict and judgment entered by the Huntingdon County Court of Common Pleas which permitted the appellee Tuscarora Intermediate Unit No. 11 (Tuscarora) to recover $1,687.09 from Nelson House for educational services Tuscarora provided Lawrence Terwilliger (Larry) during the 1973-74 school year.

The facts of this case are not in dispute. During the period relevant to this case, Larry was a mentally retarded minor whose parents resided in New Jersey. In June 1972, Larry's parents and Nelson House, an institution located in Huntingdon County and licensed by the Pennsylvania Department of Public Welfare to provide residential care for mentally retarded children, entered into a private placement arrangement and transferred Larry to Nelson House from the Lochland School, Inc., in Geneva, New York.

Nelson House does not provide educational services. However, for the 1973-74 school year, Tuscarora, pursuant to Section 1306 of the Public School Code of 1949 (Code), Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §13-1306, enrolled Larry in its program for trainable mentally retarded children. In July 1975, Tuscarora brought this suit in assumpsit against Nelson House to recover the tuition for educating Larry during the 1973-74 school year. Tuscarora premised its tuition charge for educating Larry on the fact that his parents were not residents of the school district.

Nelson House first contends that liability cannot be based upon state law, initially claiming that Larry's placement in Nelson House caused him to be a resident within the area serviced by Tuscarora and entitled him to participate in Tuscarora's education program free of tuition.

Section 1302 of the Code, 24 P.S. §13-1302, precludes us from adopting Nelson House's view as to Larry's residence. Section 1302 provides that a child is considered a resident of the school district in which his parents or guardian reside. Here Larry's parents at all times resided in New Jersey. Moreover, we believe that the word "guardian" as used in Section 1302 contemplates legal guardian, and the record is devoid of any evidence suggesting that Nelson House was anything other than Larry's temporary custodian. Thus, Larry was not a resident within the service area of Tuscarora's education program.

Consequently, Nelson House received Larry from out-of-state and, as the institution entrusted with his care and custody, was responsible for paying his tuition. That responsibility is expressly set forth in Section 1308 of the Code, 24 P.S. §13-1308, which reads in pertinent part as follows:

> If any inmates have been received from outside of Pennsylvania, or if the institution cannot certify as to their residence, their tuition shall be paid by the institution having the custody of said children. . . .

Nelson House further contends that Tuscarora, a state agency which receives federal funds, violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, by charging a tuition to educate Larry. That section provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Assuming that Section 504 applies to a person with Larry's handicaps, the fact remains that Larry was not excluded from the program; he received educational benefits without discrimination. As Judge Terrizzi well stated in the opinion below:

> First it must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another County in Pennsylvania.

We agree with the interpretation by the United States Department of Health, Education and Welfare, at 45 C.F.R. 84.33(c) (1), that there is nothing in Section 504 which relieves a third party, such as Nelson House, from valid obligations to pay for services provided a handicapped child.

Tuscarora charged tuition for Larry's education not because Larry was handicapped, but because he was from outside the district. There is no inherent discrimination by Pennsylvania in seeking tuition payment for non-residents of the state educated in Pennsylvania because tuition is also charged for Pennsylvania residents who attend school outside of their district. *See* Section 1316 of the Code, 24 P.S. §13-1316. *See also Ferndale Area School District v. Shawley*, 11 Pa. Commonwealth Ct. 185, 313 A.2d 366 (1973). Thus the class of those charged tuition uniformly embraces all who reside outside the district, so that residents of other states suffer no special disadvantage.

Accordingly, the decision of the court below is affirmed.

DAVID W. CRAIG, *Judge*

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant*	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	:	No. 51 C.D. 1980

ORDER

AND NOW, March 16, 1981, the December 20, 1979 order of the Huntingdon County Court of Common Pleas and judgment thereon is hereby affirmed.

DAVID W. CRAIG,
Judge

COURT OF COMMON PLEAS OF HUNTINGDON COUNTY, PENNSYLVANIA—CIVIL

TUSCARORA INTERMEDIATE UNIT NO. 11,
Plaintiff

v.

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,
Defendant

60 September Term, 1975
IN ASSUMPSIT

OPINION and VERDICT

Plaintiff, Tuscarora Intermediate Unit No. 11, in this proceeding is seeking to recover from the Defendant, Edgar D. Nelson, trading and doing business as Nelson House, the sum of $1,687.09 on the basis of the following factual situation:

Lawrence Terwilliger (hereinafter called Larry), a trainable mentally retarded minor, was born June 11, 1959, to parents who at all times relevant to this proceeding were residents of New Jersey. On June 26, 1972, Larry was transferred from the Lockland School, Inc., Geneva, New York, to the Nelson House, located in Spruce Creek, Huntingdon County, Pennsylvania, at the instance of his parents. Nelson House is a private institution owned and operated by Edgar D. Nelson, licensed by the Pennsylvania Department of Welfare as an institution providing residential care for mentally retarded children. Larry was enrolled in Tuscarora Intermediate Unit No. 11's program for trainable mentally retarded children for 114 days during the 1973-1974 school year. Larry was placed by his parents in Nelson House pursuant to an agreement under which Defendant agreed to provide him with residential support for $600 per month. Plaintiff, without previously seeking to recover the cost of Larry's education from his parents, seeks to recover from the Defendant the cost of educating Larry during the 1973-1974 school year.

Section 1306 of the Act of March 10, 1979, P.L. 30, 24 P.S., 13-1306, provides in sub-section (a) that the Board of School Directors of any school district in which there is located any . . . children's home, or other institution for the care or training of orphans or other children, shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district, either with or without charge for tuition, textbooks or school supplies, as the Directors of the district in which such institution is located may determine. Thus, it is apparent that the option of charging a tuition lies with the Directors of the district supplying the service.

With respect to the liability for the payment of tuition, Section 1308 of the Act of March 10, 1949, P.L. 30, 24 P.S., 13-

1308, provides in pertinent part as follows: "If any inmates have been received from outside of Pennsylvania, . . . , their tuition shall be paid by the institution having the care or custody of said children."

There appears to be no Pennsylvania cases construing the above statutory provisions. However, we do find some guidance in the matter in Official Opinion No. 69 of the Attorney General dated October 11, 1973, addressed to Honorable John C. Pittenger, Secretary, Department of Education. This Opinion states that "In general terms, the public policy of the Commonwealth is that any child living within the state is entitled to attend the public schools. This includes children placed in public or private children's institutions. The burden for the educational expense of a child being educated by the public school system is determined by Statute, Article XIII of the School Code, 24 P.S., Section 13-1301, et seq.

"With regard to children's institutions, . . . , including institutions for the mentally retarded, the following rules and guidelines apply for children receiving public education:

". . . No. 4. The educational expense for children received from outside of Pennsylvania shall be paid by the institution having the care or custody of said children. 24 P.S., Section 13-1308.

"Comment:

"(a). All children within the Commonwealth must be educated. While the Compulsory School Attendance Law refers only to children having a legal residence, it is the intent of 24 P.S., Section 13-1306, that children in children's institutions are entitled to attend the public schools. Such children would include those accepted from parents having an out-of-state legal residence.

"The institution is responsible for the public education tuition of out-of-state students. Therefore, the institution should make arrangements with the parents for the child's educational expense before accepting the child.

"If the out-of-state parents refuse to pay the institution, the institution must bear the expense."

Defendant argues at length the impropriety of charging the cost of Larry's tuition to him, based on the conclusion that Section 504 of Public Law 93-112, 29 U.S.C.A., 794, has applicability. This writer has serious doubts that that section has any application to the subject matter under consideration, in view of the limited definition of "handicapped individual" set forth in Section 706 (6), 29 U.S.C.A., 706 (6).

Be that as it may, the Court recognizes the right of Larry to an appropriate education and his right to that education on a non-discriminatory basis.

The Court has difficulty in following the Defendant's theory. First, it must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another county in Pennsylvania. Secondly, we must recognize the propriety of the Commonwealth of Pennsylvania defining the allocation of the cost of his education.

In arriving at a conclusion in this case, we must recognize that the term "free education" is a misnomer. As stated in Regulation No. 84.33, free appropriate public education, promulgated by the Department of Health, Education and Welfare, implementing Section 504 of the Rehabilitative Act of 1973, 29 U.S.C.A., 706, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents, or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardians.

It is the opinion of this writer that so long as the charge being imposed is non-discriminatory, it is appropriate and is in accordance with the provisions of the Public School Code.

On the basis of the foregoing discussion, the Appeal filed on behalf of the Defendant from the Verdict of the Arbitrators is denied, and the following Verdict is entered:

VERDICT

Verdict is entered in favor of the Plaintiff and against the Defendant for the sum of $1,687.09, with interest thereon from June 20, 1975.

By the Court

_____

President Judge

SUPREME COURT OF PENNSYLVANIA
Eastern District

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant*	No. 81-3-426 (Commonwealth Court No. 51-80)
v.	
TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the COMMONWEALTH COURT, be, and the same is hereby AFFIRMED

BY THE COURT:

_____

Marlene F. Lachman, Esq.
Prothonotary

Dated: March 16, 1983